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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 632

OLIVER W. TOLL, *Petitioner*,

v.

JOHN W. GWYNNE, ET AL., *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

To the Honorable Earl Warren, Chief Justice of the United States, and the Associated Justices of the Supreme Court of the United States:

The petitioner, Oliver W. Toll, appellant below, prays for a writ of certiorari to issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit dated and entered in the above-entitled cause on July 3, 1957.

OPINIONS BELOW

The District Court did not render an opinion.

The opinion of the Court of Appeals is reported in 247 F. 2d 581. It appears in the Appendix, *infra*, p. 1a.

The District Court gave summary judgment to defendants (respondents in this Court) in a multiple claim action. The Court of Appeals, by judgment dated and entered July 3, 1957, reversed and remanded, but, by direction of two of the three judges, included in its opinion the elimination of petitioner's first and principal cause of action from further prosecution.

This petition for certiorari does not challenge the reversal as to petitioner's secondary cause of action. It is limited to the adverse judgment on petitioner's principal cause of action.

The mandate to the District Court has been stayed pending this petition.

PROVISIONS OF CONSTITUTION, STATUTES, RULES AND REGULATIONS INVOLVED

Petitioner's claim of right to due process of law is invoked under the Fifth Amendment to the United States Constitution.

The statutes primarily involved are the Civil Service Act, of January 16, 1883, 22 Stat. 403, 5 U. S. C. § 632, *et seq.*, as amended, and the Veterans' Preference Act, of June 27, 1944, 58 Stat. 387, 5 U. S. C. § 851, *et seq.*, as amended.

Rule 56(c), (e) and (f) and Rule 44(a) of the Federal Rules of Civil Procedure are involved.

Regulations and administrative rules primarily involved are: 5 CFR, Part 20, "Retention Preference Regulations for Use in Reductions in Force"; 5 CFR (pocket supp.) §§ 01.3, 01.4, 06.1, 06.2.

Civil Service Commission Instructions: "Chapter R3" of the "Federal Personnel Manual" (not published in the Federal Register, but contained in the Court of Appeals record, transmitted to this court (order of the Court of Appeals, October 9, 1957).

The material portions of the foregoing are printed in the Appendix, *infra*, pages 14a-33a.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1). The judgment of the United States Court of Appeals was entered July 3, 1957. Rehearing was denied September 3, 1957.

An order of the Chief Justice entered September 17, 1957, extended the time for filing this petition to November 30, 1957.

Jurisdiction of the District Court was based on Section 11-301, 11-305, 11-306 and 11-325 of the District of Columbia Code; Sections 1331, 2201 and 2202 of Title 28, and Section 1009 of Title 5, of the United States Code.

QUESTIONS PRESENTED

1. Are Civil Service Commission regulations which sanction the reduction-in-force discharge of a Federal employee without according him the right to compete for continuing positions for which he is fully qualified and available, illegal as arbitrarily contravening the merit system requirements of Section 12 of the Veterans' Preference Act (5 U.S.C. Sup. § 861)?

2. Is a Civil Service Commission's determination adverse to the employee illegal under the due process clause because evidence is considered which is withheld from the employee, and opportunities to present his case to the judging authority are otherwise denied?

3. Is summary judgment for defendants appropriate when a plaintiff's uncontroverted pleadings and affidavits

before the trial court show that the ground of financial necessity, which was the purported basis for the reduction in force proceedings by which plaintiff was dismissed, was false, and that in fact the proceedings were conducted for the purpose of evading employees' merit system rights?

STATEMENT OF THE CASE

Petitioner sued the members of the Federal Trade Commission and the Civil Service Commission, in a multiple claim action, seeking a declaration of his rights and an order restoring him to Government employment after dismissal in reduction in force proceedings. The District Court gave summary judgment against petitioner. While remanding on another issue,[1] the Court of Appeals in effect sustained, by a vote of two to one, an adverse judgment on the issues involved in this petition.[2] By orders in the District Court (R. 19) and in the Court of Appeals(R. 143), defendants and appellees have been substituted to correspond with changes, pending this suit, in the membership of the commissions.

Petitioner's Employment

Petitioner is an honorably discharged veteran of World War I, a "preference eligible" under the Veterans' Preference Act, his civil service career dating from 1934, entirely in attorney positions. In 1942, after petitioner's qualifications had been examined and approved by the Civil Service Commission's Board of Legal Examiners, petitioner obtained (and now holds) permanent civil service "status",

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[1] The remand did not assure petitioner of a favorable judgment in the District Court, but only of further proceedings upon a secondary issue.

[2] Last two paragraphs of the opinion. The opinion (*infra*, p. 1a) was incorporated in the judgment (*infra*, p. 4a). *Cf. Gulf Refining Co.* v. *United States*, 269 U. S. 125, 135 (1925).

As to that cause of action it was a final judgment, law of the case. *New York Life Insurance Co.* v. *Taylor*, 81 U. S. App. D. C. 331, 158 F. 2d 328 (1946).

rendering him eligible for appointment to any attorney position of grade GS-13, or below, in the so-called "competitive service". R. 5.

Following a break in his service, petitioner in 1951 applied for employment as attorney on the staff of the Federal Trade Commission. At that time all attorney positions had by Civil Service Commission action been put under "Schedule A" (*cf.* § 6.101(d)),[3] and were called "excepted" positions. The Veterans' Preference Act (§§ 2-9) requires that any civil service position, whether "classified" ("competitive") or "unclassified" ("excepted"), for which a veteran is a candidate shall be filled through competitive examination by procedures similar to those for filling "competitive" positions. However, the Civil Service Commission, by "Part 21" of its regulations (§ 21.1, *et seq.*), as to "excepted" positions has referred compliance with the Act's requirements to the appointing agencies, and civil service "status" is treated as inapplicable to them. Thus in 1951, without benefit of his civil service "status", petitioner's qualifications were determined by a competitive examination by the Board of Legal Examiners of the Federal Trade Commission, and petitioner was appointed to the staff from among the top three of the GS-11 attorneys on the "attorney's register" maintained by that Commission. R. 5-6.

Petitioner's Discharge

In September and October, 1953, a reduction in force was conducted by Edward F. Howrey, then newly member and Chairman of the Federal Trade Commission.[4] In that op-

[3] All section references in this petition, unless otherwise indicated by the context, are to the Civil Service Commission's regulations, and are found, under the same section numbers, in 5 CFR. Schedule A evidences a determination that the positions listed are ones "for which it is not practicable to examine and which are excepted from the competitive service . . ." § 6.100, § 6.161(d), *infra*, p. 30a.

[4] Under Reorganization Plan No. 8, 15 F. R. 3175, 64 Stat. 1264, the Chairman is in charge of personnel appointments at the Com-

eration the "competitive levels" (hereinafter called "levels") of positions were narrowly restricted. R. 12, R. 69, R. 100, R. 107-108. Petitioner's "retention standing" was less than that of three other attorneys in identical positions of the same (GS-11) salary grade, but greater than that of two attorneys immediately below (grade GS-9), in positions identical except for salary grade,[5] in the same Bureau, Division and Section. R. 7. Petitioner, or his position, was selected for elimination; the incumbents, or positions in the lower grade were not. R. 7. Petitioner's request for demotion to the lower grade (R. 122-123) was denied (R. 125-126); likewise his request for furlough without pay pending anticipated rehirings. R. 111, R. 125-126. Petitioner was thereby dismissed, being denied consideration for retention in employment in the positions immediately below him. R. 7-8. There was no claim that petitioner was not qualified for those positions. R. 44-45. The denial was based on § 20.5 of the regulations. *Cf.* §20.5(c).

In a timely appeal to the Civil Service Commission, pursuant to § 20.9 of the regulations, petitioner attacked § 20.5 as illegal. On that issue there was no factual dispute. Petitioner was qualified for the positions immediately below his current position. R. 6-7. But construing the regulations as restricting petitioner's competition to a "level", the officials presiding at the hearing limited petitioner in presenting evidence to the single question of his relative retention rights as against others whose positions had been

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mission, other than the bureau heads and the legal assistants to the other Commissioners. *Cf.* p. 26, Report of Hearings before Subcommittee No. 1 of the Select Committee on Small Business, House of Representatives, Part 1, Federal Trade Commission (hereinafter called "Report of Hearings"), transmitted to this Court by the Court of Appeals by order of October 21, 1957. For appointments by him of new personnel, see "Howrey Exhibit B", pp. 31-32, Report of Hearings.

[5] The "position descriptions" (R. 31-34) are word for word the same save for trivial variations to support differentiation in grade.

placed in the same "level" as his own. R. 91; R. 95. The regulations' restriction of competition to a single "level" presents a clean-cut issue of law, which has been preserved through the administrative appeal and the later court litigation.

Petitioner's first contention is that § 20.5, so construed and applied, is invalid because contrary to § 12 of the Veterans' Preference Act. (It is also inconsistent with the regulations' definition of the statutory term "competing employees", § 20.2(c)). Point I , *infra*.

Civil Service Commission Appeal

A different issue is involved as to the administrative appeal proceedings. It arises because petitioner adopted the alternative ground that even if the regulations as construed were valid, including the function of § 20.5 of overruling § 20.2(c), still under the regulations the GS-9 and GS-11 positions in the same section should have been included in the same "level". R. 118-120. If so, petitioner's discharge was invalid under § 20.5(c).

The proper size of a "level" is recognized as a proper issue in the Civil Service Commission appeal. R. 3-19, *infra*, p. 33a.[6] *Cf.* also R. 121-122; R. 104. That issue depends upon application of the definition of "level" in § 20.2(f) to the facts of agency operation. In his appeal, petitioner specifically raised the issue. R. 118-120. The "levels" as organized did not conform to the facts of the agency's operation. R. 118-120. The positions should have been placed in the same "level". R. 7-8; R. 83-86.

At the hearing petitioner attempted to introduce evidence in support of those claims. R. 89-90. The officials presid-

[6] "R3" citations herein are the instructions contained in "Chapter R3" of the "Federal Personnel Manual (as of October, 1953, the date of petitioner's discharge). They have not been published in the Federal Register, but are in the Court of Appeals record in this case, transmitted to this Court by order of the Court of Appeals of October 21, 1957.

ing at the hearing refused to hear it. R. 90; R. 94. They examined investigators' reports(R. 13), and stated that question would be determined solely from investigators' reports. R. 90; R. 94. The investigators were not present, and petitioner was not permitted to see their reports. R. 93. The ground of refusal was that the reports were confidential because they were interoffice communications. R. 88. The only evidence which petitioner was permitted to introduce at the hearing was restricted to the single question whether or not petitioner was low man among the incumbents of the identical positions of grade GS-11, (R. 91), an issue which petitioner did not contest. To all these matters petitioner and his counsel repeatedly objected, as denial of petitioner's Constitutional right to due process of law. R. 90-91; R. 95.

There was no transcript from which the proceedings at the hearing could be reviewed. R. 92. Petitioner was not permitted to have one made. R. 87-89, 91; R. 92. The record does not show a report by the hearing officers, or that any was made. Decision was rendered against petitioner by a person who was not present at any time during the hearing. R. 13, R. 37. The official who rendered the decision had been consulted in the preparation of the reduction in force in question. R. 28; R. 108. After the hearing the Personnel Director who had operated the reduction in force, filed with the Commission an unsworn *ex parte* "certificate" (R. 50) as to a conclusion drawn from records to which petitioner had been denied access. R. 50; R. 105-106.

The facts as set forth above were alleged in petitioner's verified complaint in the District Court. R. 1-17; R. 48-56. They were amplified and supported by affidavit (R. 91-97) and depositions. R. 80-86; R. 87-91. They were not contradicted by affirmative allegations, affidavits or depositions.

Petitioner's second contention is that the proceedings in the administrative appeal with respect to the factual issue

as to the excessive narrowness of the "levels" violated his right to due process of law under the Fifth Amendment. Point II, *infra*.

Lack of Bona Fide Purpose

Also included in petitioner's appeal to the Civil Service Commission was the claim that the reduction in force operation was invalid as *ultra vires* any bona fide administrative purpose. The Commission refused to consider the claim. R. 88; R. 93; R. 49-50.

The only ground assigned for conducting the reduction in force was that "due to severe budget curtailment it has become necessary for the Federal Trade Commission to reduce its staff." R. 44. But that reason did not actually exist, was without justification, and was false and sham. R. 14. The reduction in force was not instituted for any valid administrative reason, but was conducted to create vacancies on the staff, to facilitate patronage appointments. R. 52. Shortly after taking office Chairman Howrey stated that he was under "unbelievable pressure to find jobs for people", that because of the pressure he was under he wanted to find positions to fill. R. 107. He stated at meetings of the Commission that extreme pressure was being exerted on him to make positions in the Commission available. R. 98. At the meeting of the Commissioners of the Federal Trade Commission of August 11, 1953, Commissioner Mead expressed his concern about "the business of layering present officials with new appointees or creating two jobs where only one grew before", and the trend toward putting political appointees in key spots. R. 101. Thereupon, as described by another of the Commissioners (R. 101):

> "The Chairman became quite angry. He said that he had been resisting enormous pressure from the Republican National Committee, that they had 8,000 applicants over there for whom they were seeking jobs, that he had made very few appointments here at the

> Commission, and since he was Chairman he was entitled to the support of the Commission on such matters, and that if Mead and I were not going to support him in such matters he could play tough too and start making a lot of changes around here or words to that effect. * * *"

At this time the decision to conduct a reduction in force had already been made (R. 23) and Mr. Delaney, an expert in reduction-in-force procedure,[7] had been brought into the staff to supersede Mr. McAdams, the Director of Personnel. R. 20.[8]

In the District Court the falsity of the allegation of budgetary necessity, the absence of administrative purpose, the presence of an ulterior purpose, and what the ulterior purpose was, were pleaded with particularity. R. 14-15; R. 51-53. No objection was taken to lack of specificity. The proof by affidavits supplied detailed confirmatory circumstances. Affidavits submitted by petitioner included those of two Commissioners of the Federal Trade Commission at the time of the reduction in force (R. 97-100; R. 100-103), and one by the Director of Personnel immediately prior to the commencement of the reduction in force operation. R. 106-110. On these matters—the issue of bona fide administrative purpose—respondents filed *no* affidavits, but relied solely on a certified copy of a mimeographed memorandum quoting, from another memorandum, a budget

[7] Report of Commissioner of Veterans' Cases, R. 66.

[8] When reduction in force was in prospect, Mr. McAdams had said: "For goodness sakes, don't give me a list of names of persons to be fired, but, instead, tell me the positions to be reduced or the functions of the Commission to be abolished." R. 137-138. For Mr. Howrey's promise to retain Mr. McAdams, *cf.* R. 108-109. For the latter's resignation, *cf.* Report of Hearings, p. 41, fifth line from bottom. The reduction in force began with a list of names of people to be reached. R. 108. As to the circumstances of Mr. Delaney's taking office, compare his testimony before Subcommittee No. 1 (Report of Hearings, p. 254-255) with Mr. McAdams' affidavit, R. 107, 109.

estimate of an unnamed "budget officer". R. 41-43. This was the estimate which petitioner's allegations and proof had attacked. There was no allegation, affidavit, or evidence that the estimate was made in good faith, or that it was believed by anyone to be approximately accurate. The estimate was erroneous on its face. *Cf.* affidavit of Commissioner Spingarn (R. 102):

> "* * * the reduction was made without any allowance for the normal attrition that every agency experiences as the result of deaths, retirements, resignations, and transfers of employees to other agencies. * * * This * * * factor would seemingly make it inevitable that, following the reduction, the Commission would have to hire personnel to offset normal attrition.* * *"

The estimate showed a prospective calendar year deficit of $202,500.[9] Cuts were made accordingly. R. 30. However, (affidavit of Commissioner Mead, R. 99):

> "The cut made by the reduction in force was so deep that after four or five months it developed that there would be a prospect of a surplus for the fiscal year 1954 in the neighborhood of $200,000, unless expenditures for personnel were increased. Thereupon many promotions were made and there was considerable hiring of new employees."

Prior to the reduction in force new employments in higher positions had already inflated the Commission payroll by many thousands of dollars. R. 109-110.

Two of the three members of the Court of Appeals held "that the record discloses *no basis* * * * for appellant's allegations of conspiracy or bad faith."[10]

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[9] The estimate covered prospective deficit for the nine month's period September 1, 1953, to June 30, 1954 (the last three-quarters of fiscal year 1954). It was expressed in terms of annual salaries, at $270,000. R. 43. In terms of prospective deficit, that amounted to three-fourths of $270,000, or $202,500.

[10] New to last paragraph. *Infra*, p. 3a. Italics here, and elsewhere in this petition, are inserted.

Petitioner's third contention is that, based on the record before the District Court [11] arising on motion for summary judgment, such a holding violates Rule 56(c), (e) and (f) of F. R. Civ. P. Point III, *infra*.

REASONS FOR GRANTING THE WRIT

I. Because § 12 of the Veterans' Preference Act is important to an honest and nonpolitical civil service, and because its grant of merit system rights concerns over two million Federal civil servants, the Court should protect it from frustration by 5 CFR § 20.5.

II. The denial of procedural due process in this case, consistently with the doctrine of *Bailey* v. *Richardson*, affirmed by an equally divided Court, holding that Constitutional protection does not extend to the rights of public servants, conflicts with other applicable decisions of this Court.

III. The granting and sustaining of summary judgment in this case has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of the Court's power of supervision.

[11] The original record was transmitted to the Court of Appeals, and by it to this Court, by order of October 21, 1957.

ARGUMENT

This case involves the Civil Service Commission's reduction in force regulations. Because the regulations involve considerable cross-referencing, an analysis of their material provisions is made available in the Addendum to this petition.

I.

THE REGULATIONS DENY THE EMPLOYEE HIS STATUTORY RIGHT OF COMPETITION

A.

Under § 12 Petitioner Had the Right to Compete for the Position Immediately Below His Current One

§ 12 of the Veterans' Preference Act provides:

> "In any reduction in personnel in any civilian service of any Federal agency, competing employees shall be released in accordance with Civil Service Commission regulations which shall give due effect to tenure of employment, military preference, length of service, and efficiency ratings * * *."

Thus § 12 substitutes a *rule* in the place of discretion in choosing between "competing employees".

In the instant case petitioner claimed the right to compete for a position in the same Bureau, Division and Section in which petitioner was employed, a position identical with his current one except that it was slightly lower in salary grade.

Two questions were presented: (1) Was petitioner a "competing employee" for that position? (2) If so, was petitioner entitled to retention in that position according to the standard of competition which the statute prescribed?

(1) *Peitioner was a "competing employee" for the position.*

§ 20.2(c) defines the *scope* of competition. It provides:

> " 'Competing employees' for any position in a reduction in force means the position incumbent, if any, and employees who are qualified for the position."

Petitioner was qualified for the position immediately below his current one. R. 6-7. His qualifications were never disputed. On motion for summary judgment there was nothing contravening petitioner's allegations and proof establishing him as a competing employee for the position in question within the terms of § 20.2(e).

(2) *Petitioner was entitled to retention in that position according to the standard which the statute prescribed.*

§ 20.2(g) defines the *standard* of competition which is to be applied between competing employees as "retention standing". It involves applying all four of the statutory criteria. This is explained in the Addendum, under "Standard of Competition".

As to the position immediately below his current one, petitioner's superior "retention standing" was never disputed. On motion for summary judgment there was nothing contravening petitioner's allegations and proof establishing him as having "retention standing" superior to other competitors for that position within the terms of § 20.2(g).

Since within the *scope* of § 12 (as construed by § 20.2(e)) petitioner was a "competing employee" for the position, and since within the *standard* of § 12 (as formulated by § 20.2(g)) petitioner was entitled to retention in it, denial of that right was a violation of § 12.

He was denied that right by virtue of one or more of three implications drawn from procedural provisions of the regulations. Those three implications were: (1) a discrimination against "excepted" employees; (2) a discrimination against employees who have "indefinite" tenure; (3) a curtailment of the full standard of "retention standing", which deleted the criteria of length of service and efficiency ratings,—half of the standard prescribed by § 12 of the Act.

These are the three "Barriers to Competition" described in the Addendum under the heading "The Barriers of § 20.5 Against Competition". The Addendum explains the theory on which those Barriers are implied. The Barriers operate by means of a classification of positions into "levels" (the basis for that distinction is also explained in the Addendum).

B.

The Discrimination Against "Excepted" Employees Is Illegal

Nothing in the Act implies the right to impose such a discrimination. § 2 of the Act prohibits it. The Act begins with § 2, which outlines the scope of the Act. § 2 begins:

> "In certification for appointment, in appointment, in reinstatement, in reemployment, and *in retention in civilian positions* in all . . . agencies . . . of the Government, . . . *and in either* (a) the classified civil service; [or] (b) *the unclassified civil service* . . . preference shall be given . . ."

to various classes of preference eligibles.

That provision describes the scope of the protections which the Act extends, both (a) by enumerating the sorts of protection given, and (b) by forestalling organizational or administrative distinctions which might serve as a basis for administratively restricting the scope of the statute.

(a) By specifically listing "*retention* in civilian positions" as one of the fields of protection covered by the Act, § 2 includes the protections of § 12 as among those to which the coverage of the Act applies.

(b) By enumerating both "the classified ["competitive] civil service" *and "the unclassified* ["*excepted*"] *civil* service", as equally within the protection of the Act, Congress specifically forestalled any attempted administrative exception from the scope of the Act based on the technical distinction between the classified and the unclassified

"service". Precisely that distinction, which in § 2 Congress specifically forbade, is the basis for the discrimination of § 20.5(c) against incumbents of "excepted" positions.

Moreover: in §§ 3 to 8 of the Veterans' Preference Act approximately the same provisions for competitive appointments which theretofore had existed by regulations are enacted as statutory requirements. § 9 applies those same requirements (for making appointments competitively) to the "unclassified" ["excepted"] civil service, thereby including, not only positions excepted by statute, but also the positions which had been administratively excepted by Schedule A. The sole basis for "excepting" positions under Schedule A is that they have been administratively declared to be positions "for which it is not practicable to examine". § 6.100, *infra*, p. 30a. *Cf.* § 6.101(d), *infra*, p. 30a. When § 9 of the Veterans' Preference Act specifically declares that, when veterans are candidates, those positions *shall* be filled competitively, the statute thereby disregards the administrative protestations of Schedule A, and requires that the very thing which Schedule A declares is "impracticable" shall nevertheless be done. Schedule A does not claim impracticability of incumbency protections: it has no relevance to them. An administrative assertion which Congress did not credit within its terms hardly can be a basis for a disenfranchisement of other merit system rights to which it is irrelevant.

"Schedule A" is an exception under the Civil Service Act. It occurs in § 6.100 of the Civil Service Commission regulations. The only reason stated in Schedule A for "excepting" the positions there listed is:

> "*Schedule A.* Sec. 6.100. Positions other than those of a confidential or policy-determining character *for which it is not practicable to examine* * * *".

The "exception" created by Schedule A is thus limited to dispensing with requirements (1) of the Civil Service Act

(2) as to competitive examinations. In discriminating against an employee's incumbency rights under the Veterans' Preference Act because the employee occupies a Schedule A position, the qualified permission in the Civil Service Act to make exceptions to the requirements of the Civil Service Act is used to defeat the *different requirements* of a *later statute*.

C.

The Restriction of Competition to Positions in a Single "Level" Is Unjustifiable

The discrimination of § 20.5(c) against the "excepted" service is furthermore illegal because the regulations mete out that discrimination by a measure which is of itself arbitrary. The discrimination is accomplished: (a) by treating "levels" competition as the only competition to which an employee is entitled (except by grace of the Commission); and (b) by limiting the right to enter a "levels" competition by reference only to qualifications imputed from position occupancy, instead of by reference to the employee's actual qualifications.

1. A "level" does not mark the limits of employee qualifications.

§ 20.2(c) recognizes that an employee is "competing" for any position for which he is qualified. It is common knowledge that an employee may be qualified for many different kinds of positions. The theory that a "level" delimits the positions for which an employee is qualified is constantly repudiated by transfers of employees from one section, division or bureau to another.[12] Civil service practice recognizes an employee's qualification for all positions in the classification and grade for which he has established his eligibility, and for all lower positions in the same classification. Is an employee necessarily unqualified for a posi-

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[12] Testimony of Mr. Delaney (R. 21): "I would say that almost every employee in Federal Trade Commission had been transferred at some time or another."

tion from which he has recently been promoted, or for a position identical in function but with a lower salary? § 20.5(b)(2), as to "competitive" employees of group I or II tenure, recognizes qualification for extra-level positions. Does versatility correlate with taking the Civil Service Commission examination, or being "covered in" to the "competitive" service?

§ 20.2(d), substituting current administrative determination of qualifications in the place of the normal test of eligibility, implies that decisions as to retention in employment should be related to the specific circumstances. But the restriction of "levels" competitions to incumbents of the respective "levels" is a conclusive exclusion, repudiating the ground on which § 20.2(d) rests. The regulations are not the less arbitrary because their reasoning involves two stages which are mutually inconsistent.

2. A "level" does not mark the limits within which reassignments are practicable.

The Commission suggests that reassignments should be avoided. The continuing positions in a reduction in force consist of either (a) those currently occupied or (b) those newly created. Positions currently occupied cannot be the subject of competition except by permitting reassignment if the incumbent is not the high man. Those newly created cannot be the subject of competition (or filled at all) without reassigning employees to them. There can be no competition at all in a reduction in force except by sanctioning reassignments. Reassignments are the price of competition. If the regulations aim to construct rules which will eliminate all or most reassignments of employees from one position to another, that aim rests on the purpose to avoid what the statute has directed shall be done.

3. The "levels" restriction is not necessary to simplify procedure.

In its primary function as a mechanism for simplifying the procedure of conducting personnel competition for iden-

tical or interchangeable positions the "levels" device is efficient and obvious. But its use does not require the barriers against competition which § 20.5 has erected. If "levels" competitions are conducted in descending order employees reached in the higher grades are available for automatic inclusion in each competition for lower grades. Neither § 20.2(c) nor § 20.2(f) restrict competition for a "level" of positions to the incumbents. A single series of "levels" competitions, from the top down, would completely solve all employees' rights of competition in all normal situations. Normally separate extra-levels competitions are unnecessary. The difficulties are self-imposed. Having blocked competition by the normal method of "levels", the Commission now protests that it is awkward to give it separately.

4. § 12 cannot be apportioned into a small grant of rights and a large residue for administrative largesse.

In the Court of Appeals, respondents argued that the direction of § 12 was limited to the requirement of competition within the "levels", but that the statute also conferred upon the Commission an *option* of according extra-level competition on its own terms.

This argument was amplified by giving to employees whose positions are in the same "level" the name "competing employees", and giving to employees whose current positions are in different "levels" the name "noncompeting employees". By this nomenclature the allowance of extra-level competition (§ 20.5(b)(2)) seems to result in competing noncompeting employees.[13] But there is nothing

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[13] Brief for appellees, p. 12: "It is this bumping or reassignment right—created by the regulation and permitted but not required by Section 12—which makes possible *displacement of a non-competing employee* holding a lower-paying job with a lower subgroup standing. This right, as already noted, is entirely different from the right conferred by the statute itself—namely, the right to be retained over competing employees in the same competitive level occupied at the time of the reduction in force."

in the statute which restricts the competition which it grants to the limits of the regulations-made device of "levels".

Cf. Seagrave v. *United States*, 128 F. Supp. 400, 402-403 (Ct. Cl., 1955).

D.

The Regulations Improperly Discriminate Against the Employee With "Indefinite" Tenure

This Barrier denies a "competitive" employee competition outside of the "level" in which his current position is placed if his tenure is "indefinite". It applies its discrimination by the same *method* (restriction of competition to a "level") by which the discrimination of the First Barrier (against "excepted" employees) is accomplished. What has been said under heading C, *supra*, as to the arbitrary character of restricting competition to a "level" applies equally against the Second Barrier.

The basis of the discrimination of the Second Barrier, however, is different. The employee is penalized, not because he holds an "excepted" position, but because he has "indefinite" tenure.

Tenure is a criterion which forms a term in the *standard* of competition: it is given full effect in the determination of "retention standing". That is a wholly different question from the *scope* of competition,—the determination of which employees are reasonably alternative possibilities for retention in a given position.

But aside from that confusion, the Second Barrier is erroneous, even if considered as an application of the standard of competition. To deny an employee of "indefinite" tenure any competition against another employee also of indefinite tenure—which the Second Barrier does—is to refuse to give any effect to any of the remaining criteria,—military preference, length of service, and efficiency ratings.

E.

The Regulations Illegally Deviate From the Standard of Competition Prescribed by the Statute

The Third Barrier deletes the criteria of length of service and efficiency ratings in any competition for a position not placed in the same "level" as that in which the employee's current position is put (except a position from which the employee was promoted). These are the two criteria which in common sense are the most important.

In § 12 of the Act Congress was concerned not solely for veterans: it also desired to protect employees who had given years of service to the Government and whose efficiency had been good. To eliminate those criteria is to refuse a protection which Congress directed. Congress authorized the Commission to give the criteria "due effect", but not to select from among them those which the Commission might choose to effectuate, and to eliminate the others. The Commission cannot substitute its own standards for those of the statute. *Social Security Board* v. *Nierotko*, 327 U. S. 358, 369 (1946); *Trust of Bingham* v. *Commissioner of Internal Revenue*, 325 U. S. 365, 377 (1945); *Addison* v. *Holly Hill Fruit Products, Inc.*, 322 U. S. 607, 614-617 (1944); Mr. Justice Roberts, concurring, *id.*, 623; *M. E. Blatt Co.* v. *United States*, 305 U. S. 267, 279 (1938); *Manhattan General Equipment Co.* v. *Commissioner Internal Revenue*, 297 U. S. 129, 134 (1936); *Waite* v. *Macy*, 246 U. S. 606 (1918); *United States* v. *Park Motors*, 107 F. Supp. 168, 173 (E. D. Tenn., 1952); *Seagrave* v. *United States*, 128 F. Supp. 406, *supra*; *Hamilton National Bank* v. *District of Columbia*, 156 F. 2d 843, 845-846 (D. C. Cir., 1946); *State of Washington* v. *City of Seattle*, 309 P. 2d 751, 753 (Wash., 1957); *cf. Peters* v. *Hobby*, 349 U. S. 331.

II.

A FAIR ADMINISTRATIVE HEARING WAS DENIED

The facts under this point are set out in the Statement of the Case, under the heading *Civil Service Commission Appeal*. They show that a material factual issue was presented at the Civil Service Commission appeal, that petitioner was not permitted to introduce evidence on it, that evidence was considered which was withheld from petitioner, that an adverse decision was given by a person who was not present at the hearing, without a transcript by which the proceedings could be reviewed, and that these matters were shown without contradiction to the District Court.

There was the same right to a fair hearing as if the appeal had been provided by statute. *Accardi* v. *Shaughnessy*, 347 U. S. 260, 265 (1954); *Service* v. *Dulles*, 354 U. S. 363 (1957).

The conduct of the hearing was in violation of petitioner's Constitutional rights to procedural due process of law. *Wong Yang Sung* v. *McGrath*, 339 U. S. 33, 49 (1950): "The constitutional requirement of procedural due process derives from the same source as Congress' power to legislate and, where applicable, permeates every valid enactment of that body."; *United States* v. *Morgan*, 304 U. S. 1, 14-15 (1938); *Ohio Bell Telephone Co.* v. *Public Utilities Commission*, 301 U. S. 292, 300-306 (1937); *Simmons* v. *United States*, 348 U. S. 397, 405 (1955); *Interstate Commerce Commission* v. *Louisville & Nashville R. Co.*, 227 U. S. 88, 93 (1912); *United States* v. *Libby, McNeil & Libby*, 107 F. Supp. 697, 703 (D. Alaska, 1952); *Cf. W. S. Butterfield Theatres* v. *Federal Communications Commission*, 99 U. S. App. D. C. 71, 75-76, 237 F. 2d 552 (1956).

Presumably the courts below denied relief on the theory that Constitutional protection does not extend to the rights of public servants. *Cf. Bailey* v. *Richardson*, 182 F. 2d 46, sustained by equally divided vote, 341 U. S. 918. But the

decisions of this Court are to the contrary. *Cf. Wieman* v. *Updegraff*, 344 U. S. 183, 189-192 (1952); *Slochower* v. *Board of Higher Education*, 350 U. S. 551, 556-559 (1956).

III.

THE REDUCTION IN FORCE WAS INVALID FOR LACK OF BONA FIDE ADMINISTRATIVE PURPOSE

The facts under this point are set out in the Statement of the Case, under the heading *Lack of Bona Fide Purpose*. They show that the reduction in force was not conducted for an administrative reason, but in order to evade employees' merit system rights, that the Civil Service Commission refused to entertain the objection, and that these matters were shown to the District Court without contradiction except for the filing of a certified copy of a memorandum quoting from another memorandum.

In considering the certified copy of the memorandum for purposes of summary judgment, the District Court apparently confused Rule 44(a), F. R. Civ. Pro., with Rule 56(e), as appears at R. 132-134. The memorandum was not admissible for consideration under Rule 56(e). *Goldman* v. *Summerfield*, 94 U. S. App. D. C. 209, 214 F. 2d 858, 859 (1954).

Fraud or bad faith on the part of officials in Government personnel matters invalidates the action. *Gadsden* v. *United States*, 111 Ct. Cl. 487 (1948); *Knotts* v. *United States*, 128 Ct. Cl. 489 (1954).

Presumably the courts below reasoned from the doctrine of official immunity as to the official's personal liability (*cf. Gregoire* v. *Biddle*, 177 F. 2d 579, 580 (2d Cir., 1949)) to the conclusion that bad faith would not invalidate official action. (In *Hammond* v. *Hull*, 131 F. 2d 23, 28 (D. C. Cir., 1942), the Court seems to have cited *Cooper* v. *O'Connor*, 69 U. S. App. D. C. 100, 99 F. 2d 135, an action against an official for damages, as relevant to a suit limited to relief in the nature of invalidating the official action.)

But the ground for allowing personal immunity, explained by Judge Learned Hand in *Gregoire* v. *Biddle*, *supra*, does not apply to the invalidation of the action itself. The distinction has been pointed out by this Court in *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123, 139-140 (1951).

The rendering of summary judgment on such a record was erroneous. *Sartor* v. *Arkansas Gas Co.*, 321 U. S. 620, 627-628 (1944); *Colby* v. *Klunq*, 178 F. 2d 872-875 (2 Cir., 1949). *Cf. Burley* v. *Elgin, Joliet & Eastern Railway Co.*, 140 F. 2d 488 (7 Cir., 1944), affirmed, *Elgin, Joliet & Eastern Railway* v. *Burley*, 325 U. S. 711, 743-744 (1945); *Gray Tool Co.* v. *Humble Oil & Refining Co.*, 186 F. 2d 365 (5 Cir., 1951), cert. den., 341 U. S. 934, reh. den., 341 U. S. 965; *Whitaker* v. *Coleman*, 115 F. 2d 305 (5 Cir., 1951); *Cellini* v. *Moss*, 232 F. 2d 371 (D. C. Cir., 1956); *Garrett Biblical Institute* v. *American University*, 82 U. S. App. D. C. 265, 163 F. 2d 265, 267 (1947).

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Petitioner, Pro Se.

ADDENDUM

Analysis of Reduction in Force Regulations

The Requirements of § 12 of the Veterans' Preference Act

The obligation of the regulations is to apply the brief direction of § 12 of the Veterans' Preference Act. § 12 requires:

> "In any reduction in personnel in any civilian service of any Federal agency, competing employees shall be released in accordance with Civil Service Commission regulations which shall give due effect to tenure of employment, military preference, length of service, and efficiency ratings * * *."[1]

That statutory direction sets up a *standard* of competition for retention in employment, namely, "Civil Service Commission regulations which shall give due effect to" the four specified statutory criteria. But to carry § 12 into practical effect, it is necessary also, in each particular case, to determine the *scope* of competition— the circumstances in which that standard is to be applied. As to the latter question § 12 has used a single word—"competing".

A.

The Standard of Competition

1. "Retention standing": the statutory criteria given effect.

The *standard* for comparative rank between employees is called "*retention standing*". § 20.2(g) defines "retention standing" by reference to retention group and subgroup, and by retention credits within each subgroup. The result of the "groups" (§ 20.4(c)), "subgroups"

[1] Only the body of § 12 is quoted, because its provisos have no bearing in this case. This case does not involve any dispute as to crediting time of military service (first proviso); nor as to the paramount character of one criterion over another in formulating the standard of competition (second proviso, *cf. Elder* v. *Brannan*, 341 U. S. 277 (1951); nor as to any inter-agency transfer of functions (third proviso).

(§ 20.4(c)), and "retention credits" (§ 20.2(h)) is that "retention standing" is determined by the *seriatim application* of the four statutory criteria in the following order: (1) tenure of employment; (2) military preference; and (3) length of service and efficiency ratings (combined). First, tenure differences control;[2] thereafter, military preference controls; thereafter efficiency ratings and length of service are given effect.

2. Rules for the criteria individually.

Within that scheme of seriatim application, the statutory criteria are given effect as follows:

a. *Tenure groups.* "Tenure of employment" refers to the duration indicated in the appointment form (Form 50). § 20.4(c) describes three tenure "groups". Group "I" includes employees whose appointments are not "indefinite" or "temporary" (*i.e.*, the appointments do not specify any duration), and who have served the required probationary period. Group "II" includes employees of group I tenure who have not completed the probationary period, also employees promoted by an "indefinite" or "temporary" appointment from a position of Group I tenure. Group "III" includes employees whose appointment forms insert the word "indefinite".

b. *Military preference.* The "subgroups" simply classify veterans[3] from nonveterans (last sentences of each subdivision of § 20.4(c)).

c. *Length of service and efficiency rating.* The "retention credits", defined in § 20.2(h), give joint effect to length

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[2] Besides the three tenure groups described in § 20.4(c), the last two sentences of § 20.4(d)(1) set up in effect two infra-groups: (1) what is really a fourth tenure group, employees whose tenure is "temporary"; (2) employees, of whatever tenure, whose last efficiency rating has been "unsatisfactory". Neither is involved in this case.

[3] *Cf.* § 1.102(ee): "'Veteran' means a person entitled to preference under the Veterans' Preference Act of 1944 . . ."

of service and to the employee's last efficiency rating. Only the last efficiency rating is given any effect. "R3-9", *infra*, p. 32a.

B.

The Scope of Competition

1. The test of "competing employees".

§ 12 of the Act directs that the standard of competition (*cf.* "retention standing", just described) is to be applied between "competing employees". The regulations construe the statutory term "competing employees" as describing, *in regard to any position*, those employees who are qualified for it. § 20.2(e) states:

> "'Competing employees' *for any position* in a reduction in force means *the position incumbent*, if any, and[4] employees who are qualified *for the position*."

Thus § 20.2(e), which defines *where* the statutory standard of competition ("retention standing") is to be applied, makes it clear that the standard can be applied to specific employees only by first identifying the position with respect to which the employees compete.

"Competing" describes a relationship governed by a double reference—(1) to a *goal*, and (2) to *individuals*. Both elements are essential to the concept. The competitors are related only by reference to the goal. The employee's goal is some *position*.[5] He has multiple goals,

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[4] At this point the word *other* might have been inserted, except that the prior words "*if any*" take notice that a previously vacant or currently created position (having no incumbent) may also be the object of competition.

[5] John A. Overholt (formerly Chief of the Performance Rating Section, Civil Service Commission, and in charge of the reduction in force program in the Government), "Discussion of Lay-Off Procedures", 15 Public Personnel Review 133, 135 (July, 1954). To the question, "What are they competing for?", he points out: "They are not competing to be let out—they are competing to be retained. They can be retained only in specific jobs."

since each continuing position[6] for which he is qualified offers a possibility of retention in employment. § 20.2(c) applies to each of the multiple goals. It is distributive, referring to "*any* position". It calls for as many different fields of personnel competition ("competing employees") as there are different continuing positions, which are the *foci* of those fields.

2. The test of "qualified".

In civil service practice, classification for determining qualifications, or "eligibility", generally follows broad occupational groups, not the narrow occupational subdivisions used in exactly locating particular positions within an occupational classification, by "series". Establishment of qualifications for any particular salary "grade" ("level of difficulty or responsibility") of an occupational classification includes qualification for all lesser "grades" in the same classification. *Cf.* § 1.102(i), *infra*, p. 30a. These general civil service principles of eligibility seem to establish a *presumption* of "qualification" for reduction in force purposes. *Cf.* "R3"-13-14, *infra*, p. 32a-33a. However, § 20.2(d) contains a definition of "qualified" which relates to the particular circumstances, and thereby in effect reserves to management a veto power, permitting it affirmatively to dispute the qualifications of an employee for a position.

C.

Procedural Steps

1. Division into "areas". The first step in conducting a reduction in force is to divide various parts of the agency into so-called "competitive areas." § 20.4(a). For prac-

[6] The term "continuing position" is used herein to embrace any position which exists as an occupied position as of the end of the reduction in force operation, regardless of its history (occupied, vacant, or currently created). It comes to the same thing, *cf.* § 20.5(d). Similarly, references to eliminating positions include positions which become vacant (whether or not left on the table of organization).

tical purposes each "area" is in effect subject to a separate reduction in force operation. § 20.4(b). The agency determines in which "areas" it shall make reductions. An employee's competition is limited to competition for positions within the "area" in which his current position lies. All further steps described below apply only within an "area".

2. Assembling positions into "levels". Other procedures are based on the presupposition that "levels" have been formed. § 20.2(f) provides:

> "Competitive level" means all similar positions within a competitive area in which employees could be readily interchanged, without undue interruption to the work program. (Generally such positions will be in the same grade or occupational level, but this is not necessary if the other tests are met.)"

Thus by definition a "level" is an assemblage of *positions*. The various uses to which "levels" are put are described under heading D, *infra*.

3. Determining cuts per "levels". § 20.4(b) calls for a determination of *how many positions* (not *which* positions)[7] are to be cut from (or added to) each "level".

4. "Levels" competitions. Except for § 20.2(c), the only provision specifically directing competition is § 20.4(e). It directs separate competitions for each group of positions which have been put in the same "level". These are herein termed "*'levels' competitions*". § 20.4(e) indicates that an employee may compete for any position in the "level" in which his current position is placed.[8] The affirmative provision of § 20.4(e) is reinforced by the prohibitions of § 20.5(b)(1) and (c), which, between them, cover all em-

[7] By its terms. Also, otherwise § 20.4(e) would often result in a surplus of employees "reached". Also, *cf.* "R3"-10.

[8] In construing § 20.4(e), it may be noted that the "register" is a compilation restricted to a single "level". § 20.4(d).

ployees.[9] The "levels" competitions are evidently restricted to employees whose current positions have been placed in the particular "level". *Cf.* § 20.4(c); § 20.5(b)(1) and (c).

5. Extra-level competition. Besides the more specific provision of § 20.2(c), there is also an implication in § 20.5(b)(2) that there may be competition by an employee for positions for which he is qualified which have been placed in some other "level" than that in which his current position was placed; but that implication of § 20.5(b)(2) carries various implied restrictions. Competition of an employee for positions other than those placed in the same "level" as his current position is herein termed *"extra-level competition"*. The affirmative implication of extra-level competition carried by the prohibitions of § 20.5(b)(2) is restricted to "competitive" employees who are in tenure groups I or II. As to them, its implied recognitions of competition are of two sorts:

a. *Reassignment to a position from which promoted.* § 20.5(b)(2), in its final clause, implies that an employee may compete for "a continuing position from which he was promoted" and for which he is qualified.

b. *Other reassignments.* § 20.5(b)(2), down to the final clause, implies that an employee may also compete for any other position (besides one from which he was promoted) for which he is qualified, if his transfer to it would be "a reasonable change in position"; but such competition is impliedly restricted to competition based on only the criteria of tenure and military preference (excluding the criteria of length of service and efficiency ratings).[10]

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[9] § 20.5(b)(1) applies to "competitive" employees; § 20.5(c) applies to "excepted" employees. All positions are either "competitive" or "excepted".

[10] The reference to "*subgroup* standing" (instead of "retention standing", as elsewhere) in § 20.5(b)(2) implies that only the criteria of tenure and military preference, which determine the "subgroups", *cf.* § 20.4(c), are to be considered.

6. "Administrative actions".

§ 20.5(d) authorizes "administrative" transfers of all kinds during a reduction in force, in addition to the actions resulting from competition. *Cf.* also R3-3, *infra*, p. 31a.

D.

The Four Functions of "Levels"

The definition of a "level" in § 20.2(f) has been quoted above. Under the procedural provisions of the regulations a "level" may be regarded as serving in four different functions. These are:

1. A mechanism for group competition. The "levels" mechanism provides for a simultaneous comparison of the respective retention standings of a group of employees in a group personnel competition for a group of positions (*cf.* § 20.4(e)). To that extent, the "levels" device is a sensible, labor-saving and obvious method of facilitating the mechanics of a reduction in force.

2. Defining areas of personnel choice. In effect the "levels" are designated as the areas where personnel considerations are paramount, and in which decision as to impact of cuts shall therefore be made according to retention standing; while all other decisions as to the impact of the reduction in force are reserved for management's discretion, exempt from restriction by § 12 of the Act, as supposed to be made on purely abstract positional grounds.

3. Treating position incumbency as establishing a right to compete for positions. § 20.4(e), in directing "levels" competition, omits reference to whether incumbents of the positions in the "level" are qualified. So does § 20.5(b)(1) and (c). But § 20.2(c) describes being "qualified" as the test of the right to compete for a position. Treating the provisions of § 20.4(e), and § 20.5(b)(1) and (c) as paramount in that respect over § 20.2(c), they grant an employee the right to compete for any position in the "level" in which his current position is placed, free from challenge as to his qualifications for it. (*Cf.* the similar effect

produced by § 20.2(c) in including an incumbent as a competitor for his current position, without subjecting him to the condition of being "qualified".)

4. Treating position incumbency as a limitation upon the right to compete for positions.

(1) § 20.4(c), aided by the implications of § 20.5(b)(1) and (c), indicates that a "*levels*" *competition* is open only to incumbents of the positions in the "level".

(2) The implications of extra-level competition contained in § 20.5(b)(2), carry, when § 20.5 is read as a whole, the negative implications that *extra-level competition* is limited to that implied in § 20.5(b)(2).

The limitation of "*levels*" *competitions* to incumbents of positions in the particular "level", plus the limitation of *extra-level competition* to that contained in § 20.5(b)(2), results in making an employee's *position incumbency* a limitation upon his right to compete for any continuing positions, except: (1) continuing positions, if any, in the same "level" in which his current position is placed, plus (2) such extra-level competition, if any, as he may be entitled to have under the implications of § 20.5(b)(2).

E.

The Barriers of § 20.5 Against Competition

The studied and elaborate omissions of § 20.5, which fail in certain cases to provide for according to an employee the right of competition, recognized by § 20.2(c), to compete for retention in employment in positions for which he is qualified, are construed by the Civil Service Commission as amounting to three Barriers against Competition, as follows:

1. The First Barrier: against all "excepted" employees: § 20.5(c).

The First Barrier, implied by § 20.5(c), is that an employee who currently occupies an "*excepted*" position may not compete for any position except those, if any, which remain in the "level" in which his current position was put. It denies him any extra-level competition.

2. The Second Barrier: against "competitive" employees of "indefinite" tenure: § 20.5(b).

The Second Barrier, implied by § 20.5(b), is that an employee who currently occupies a "*competitive*" position, and *who is not in tenure group I or II*, may not compete for any position except those, if any, which remain in the "level" in which his current position was put. It denies him any extra-level competition.

3. The Third Barrier: against "competitive" employees of higher tenure: § 20.5(b)(2).

The Third Barrier, implied by § 20.5(b)(2), is that an employee who currently occupies a "*competitive*" position, and *who is in tenure groups I or II* (all other employees have been eliminated, by the first two Barriers, from *any* extra-level competition), in competing for positions other than those, if any, which remain in the "level" in which his current position was put, or other than positions from which he has been promoted, may not have the benefit of any superiority which he possesses over others in the statutory criteria of either length of service or efficiency ratings. It denies him half of the standard of "retention standing".

It is these Barriers against Competition, which are based on the negative implications inferable in the affirmative implications arising from the prohibitions of § 20.5(b) and (c), and which are contrary to the definition of "competing employees" of § 20.2(e), which petitioner asserts are illegal. The First Barrier applied to petitioner, since petitioner currently occupied an "excepted" position. The Second and Third Barriers did not apply to petitioner, but only to employees who occupied "competitive" positions. *Hoffman* v. *Brucker* (cited by the Court of Appeals in the instant case) sustained the Second Barrier against an employee who was within its implications, since he was a "*competitive*" employee of "indefinite" tenure. See petitioner's petition for rehearing in the Court of Appeals, Appendix, *infra*, pp. 5a-11.

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,472

OLIVER W. TOLL, *Appellant*

v.

JOHN W. GWYNNE, ET AL., *Appellees*

Appeal from the United States District Court for the District of Columbia

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Decided July 3, 1957

Mr. Oliver W. Toll, appellant pro se.

Mr. Morton Hollander, Attorney, Department of Justice, with whom Assistant Attorney General Doub, and Messrs. Oliver Gasch, United States Attorney, and Paul A. Sweeney, Department of Justice, were on the brief, for appellees. Mr. Lewis Carroll, Assistant United States Attorney, also entered an appearance for appellees.

Before BAZELON, DANAHER and BASTIAN, Circuit Judges.

BAZELON, Circuit Judge: Appellant sued the members and the Director of Personnel of the Federal Trade Commission, and the members of the Civil Service Commission, in their official and individual capacities, seeking a declaration of his rights as a veteran preference eligible and an order restoring him to Government employment. He appeals from a summary judgment entered against him by the District Court.

Among other contentions, appellant alleged in his complaint and argues here (1) that he was a competing employee with holders of positions in lower grades and should have been retained in their stead; and (2) that he was

denied re-employment rights to which he was entitled under § 15 of the Veterans Preference Act.[1] The first contention seems to be foreclosed by Hoffman v. Brucker, U.S. App. D.C. , F. 2d (decided May 23, 1957.)

With respect to appellant's second contention, appellees concede that he is a "preference eligible who has been . . . separated without delinquency or misconduct," so that § 15 applies to him. The section requires that such a person "shall have his name placed on" various employment lists and "shall then be eligible for recertification and reappointment . . ." It provides further that "when there are three or more names of preference eligibles" on the re-employment list for the position in question, no new employee other than a ten-point veteran may be appointed to fill the position.

In defense of the summary judgment awarded them below, appellees assert that "there can be no doubt that Mr. Toll was accorded all the rights to which he was entitled under Section 15." They point to evidence in the record that appellant's name was placed on a Federal Trade Commission re-employment list and that he was informed it would remain on the list for a year. But these facts are insufficient to support the conclusion. If the summary judgment is to stand, it must appear, beyond genuine issue, that, while appellant's name was on the re-employment list, no new employee, other than a ten-point veteran, was hired; or that, if a new employee was hired, the list did not have three names on it at the time.

After the argument, the record appeared to us to be somewhat obscure on these points, as is often true when a complex case is disposed of on a motion for summary judgment. We therefore asked the parties to direct our attention by memoranda to any matter in the record bearing upon the points in question.

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[1] 58 Stat. 391, 5 U.S.C. § 864.

Appellant, in reply to our request, has directed our attention to material in the record indicating that, after his separation, a number of new employees were appointed by the Federal Trade Commission to positions for which he is qualified. Although it seems likely that some of these appointments occurred during the year in question, the record does not disclose their dates. Nor does the record show whether the new appointees were ten-point veterans; nor how many names of preference eligibles were on the re-employment list when they were hired.

Appellees' reply to our questions was that the record does not show that the Federal Trade Commission appointed any new employees other than ten-point veterans, during the year in question, to positions for which appellant is qualified. They do not say the record shows such persons were not employed.

On such a record, summary judgment should not have been granted. The judgment is reversed and the case remanded to the District Court.

On the present state of the record, I would confine our decision to the issues discussed in the foregoing. My brethren, however, hold that the record discloses no basis, either procedurally or factually, for appellant's allegations of conspiracy or bad faith.

If, upon remand, sufficient facts are developed by affidavit or otherwise on the issue whether appellant was afforded the re-employment rights to which § 15 of the Veterans' Preference Act entitles him, either or both of the parties may file motions for summary judgment. Otherwise the case should proceed to trial on that issue.

REVERSED AND REMANDED.

[Same caption, *Toll* v. *Gwynne*, Court of Appeals]

Judgment

This cause came on to be heard on the record from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof, It is ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, reversed, and that this cause be, and it is hereby, remanded to the said District Court for further proceedings not inconsistent with the opinion of this court.

Dated: July 3, 1957

Per Circuit Judge Bazelon.

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,472

OLIVER W. TOLL, *Appellant,*

v.

JOHN W. GWYNNE, ET AL., *Appellees.*

Appeal From the United States District Court for the District of Columbia

---

PETITION FOR REHEARING

Appellant petitions, under Rule 26 of this Court, for a rehearing with respect to the direction, contained in the last two paragraphs of the opinion rendered in this case by the Court on July 3, 1957, to the effect that (pursuant to the holding of a majority of the panel of the Court which heard the case) proceedings upon remand to the District Court be limited to the issue of appellant's statutory re-employment rights. Said holding of the majority derives

support from the second sentence of the second paragraph of the opinion, namely, "The first contention [of the appellant, viz., that he was a competing employee for positions in lower grades] seems to be foreclosed by *Hoffman* v. *Brucker*, — U.S. App. D.C. —, — F. 2d —, (decided May 23, 1957)." Appellant also seeks reconsideration of that sentence of the opinion.

The grounds of this petition include, besides contentions heretofore advanced in appellant's briefs and oral argument, the following:

I. Illegality of Section 20.5(c)

Appellant contends that Section 20.5(c) of the Civil Service Commission's reduction in force regulations, if construed as a barrier to appellant's statutory right to compete for positions for which appellant was qualified and available, is illegal as an unwarranted frustration of the rights given by Section 12 of the Veterans' Preference Act and by Section 20.2(c) and (d) of the regulations.

II. Appellant Not Foreclosed by Hoffman v. Brucker

Appellant urges that his statutory rights of competition for retention in employment are not foreclosed by the decision of this Court in the case of *Hoffman* v. *Brucker*.

A decision rendered in another case nine days after oral argument in this case seems to lack weight as *stare decisis* in this case, already submitted. In any event, the *Hoffman* case is distinguishable.[1] To demonstrate the difference between the two cases, we must analyze the respective provisions in subsections (b) and (c) of Section 20.5 of the regulations, which are involved in the two cases.

[1] Because this point is completely new in this case, hence could not have been covered in the briefs, and also because of the intricacy of the regulations, appellant asks the Court's indulgence as to the length of the discussion of this point.

Subsection (b) applies to "employees in positions in the competitive service", and to them alone. Similarly subsection (c) applies to "employees in positions excepted from the competitive service", and to them alone. In aggregate, subsections (b) and (c) cover all employees, whether "competitive" or "excepted"; but they do it by describing their rights separately and disjunctively. By their restriction to different classes, the provisions are mutually exclusive.

Subsection (b) has two parts, indicated by its subdivisions "1" and "2". Subdivision (1) applies to all "competitive" employees. Subdivision (2) describes the rights of "competitive" employees in Groups "I" and "II" (defined in Section 20.4 (c)(1) and (2), respectively), omitting Group III "competitive" employees (cf. Sec. 20.4(c)(3)). Thus the retention rights of "competitive" employees of Groups I and II are described in Subsection (b)(1) *and* (2); while rights of Group III competitive employees are described only in Subsection (b)(1). This arrangement of subsection (b) sets up, among "competitive" employees, a further classification, viz., between Group III competitive employees and Group I and II competitive employees.

That three-way classification—(1) "excepted" employees, (2) Group III "competitive" employees, and (3) Group I and II "competitive" employees—is the framework on which the description in Section 20.5(b) and (c) of retention rights proceeds. Against each of those three classes Section 20.5(b) and (c), if construed as limiting retention rights, has set up a barrier,—one for each category of employees. Thus:

First Barrier. Subsection (c) applies to "excepted" employees, and to them alone. By virtue of its failure to recognize for "excepted" employees the full statutory competitive rights (cf. Sec. 20.2(c) and (d)), it is construed as a barrier against competition for any position not placed in the same "level" as the employee's current position,—a barrier which applies to all employees occupying excepted positions, and to them alone.

Second Barrier. Subsection (b) applies to "competitive" employees, and to them alone. By virtue of the failure of Sec. 20.5(b)(2) to recognize for Group III "competitive" employees the full statutory competitive rights (cf. Sec. 20.2(c) and (d)),[2] subsection (b)(2) is a barrier against competition for any position not placed in the same "level" as the employee's current position,—a barrier which applies to all Group III "competitive" employees, and to them alone.[3]

Third Barrier. Subsection (b)(2) applies to Groups I and II competitive employees. The reference, in the first provision of subsection (b)(2) to "subgroup standing" (instead of "retention standing", as in its second provision, and in subsection (b)(1)) implies that in competing for any extra-level position (except one from which the Group I or II competitive employee has been promoted) a Group I or II competitive employee is restricted to half of the statutory criteria of competition.[4] This Third Barrier applies to Group I and II competitive employees, and to them alone.[5]

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[2] And contrast the greater rights recognized by Section 20.5(b)(2) for Groups I and II competitive employees.

[3] It happens that the Second Barrier (the restriction against Group III competitive employees) contains the same penalty (restriction of competition to positions in the same "level") as the First Barrier (the restriction against "excepted" employees). But these different barriers are erected by different provisions; each implied restriction is complete in itself; and each applies to a different category of employees.

[4] The Third Barrier penalty is that the Group I and II competitive employees may not assert the full statutory standard of competition ("retention standing", cf. Sec. 20.2(g)), but lose, within the field of this restriction, any advantage based on either length of service or efficiency ratings.

[5] It was unnecessary for the regulations to make the Third Barrier apply to any other category of employees than Groups I and II competitive employees, since the First Barrier and the Second Barrier, between them, had excluded all other employees from any competition whatever for any extra-level position.

The case of *Hoffman* v. *Brucker*, — U.S. App. D.C. —, — F2d —, cited in the opinion in the instant case, involved the Second Barrier, for the appellant in that case was a Group III competitive employee, who was debarred from competing for extra-level positions by virtue of the restriction implied in subsection (b)(2). The issue presented in that case was whether the Second Barrier was legal, i.e., whether the fact that a Group III competitive employee had only indefinite tenure was a reasonable basis for excluding him from competition for any extra-level positions.

In the instant case a different barrier, the First Barrier, based on subsection (c), is involved. The validity of the First Barrier depends on whether the fact that an employee holds an "excepted" position is a proper basis for excluding him from competition for any extra-level positions. This First Barrier discrimination is in the teeth of Section 2 of the Veterans' Preference Act; its illegality has been rather elaborately argued in appellant's briefs, and appellees have made little if any attempt to justify it. Appellees' tactics have been, instead, to fall back on the Second and Third Barriers, particularly the Second, which was involved in the *Hoffman* case. Rich in barriers, apparently they regarded the First Barrier as expendable.

The trouble with that argument is that, *as the regulations are drawn*, the barriers of Sec. 20.5(b) and (c), protecting the spoils system from invasion by the merit system rules of the Veterans' Preference Act, have been constructed, not in multiple, but in series. They form a line of defense divided into three segments, each segment of the line having its own barrier, much as the Roman wall might have depended along one length to a barrier against the Celts, along the next length to a barrier against the Picts, and along the third length to a barrier against the Scots. If each segment holds, the defense is complete. But if the barrier against the Celts fails, it is not enough that the barriers against the Picts and the Scots are still standing.

Appellant belongs to the tribe of "excepted" employees. Against him is only the barrier of Sec. 20.5(c), the First Barrier. On that barrier there has been no attempt of defense. Instead appellees have asked appellant to pretend he is a Pict, and kindly to go back and try to cross the Second Barrier, which, since the argument of the instant case, has now received barely timely reenforcement by the *Hoffman* decision.

If the Court applies the *Hoffman* case to the instant case, the Court would seem to be extending the Second Barrier to serve as defense in depth against "excepted" employees, against whom only the First Barrier has been constructed.[6] Such an extrapolation of the Second Barrier amounts to rewriting the regulations so as to make their provisions embrace territory which their terms do not cover. Due respect for the regulations of "the officials charged with primary responsibility in administering the act" hardly calls for reading into the regulations additional frustrations of the statute which the regulations, albeit through oversight, have failed to include.

III. Constitutional Right to Due Process of Law

Appellant contends that in the adverse adjudication in the Civil Service Commission appeal he was denied a fair hearing, in violation of his rights to due process of law under the Fifth Amendment to the United States Constitution.

In contrast to the situation in *Hoffman v. Brucker*, in the instant case appellant *did* "urge that the jobs [involved

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[6] Extension of the Second Barrier to restrict "excepted" employees seems to be further emoarrassed by still another of the regulations' many defensive systems ("Twenty-nine distinct damnations, One sure if another fails"), namely, the restriction against statutory competition involved in Sec. 20.4(d)(2), which eliminates any competition of competitive employees for excepted positions and any competition of excepted employees for competitive positions. If competitive and excepted employees cannot even be placed in the same retention register, it seems inconsistent that a barrier against competitive employees should be available against an excepted employee.

were] interchangeable", hence appellant was entitled to a fair administrative hearing on that issue.

IV. Bogus Reduction in Force

Appellant urges that the holding of the majority of the panel "that the record discloses no basis" for appellant's claims as to the bogus character of the reduction in force is erroneous, in view of the specificity of the allegations of the pleadings and the detail of the matters presented by affidavit. If such holding is reached as a ruling of law, it fastens open the door to destruction of merit system rights through fraudulent reductions in force.

Respectfully submitted,

OLIVER W. TOLL
Appellant, *Pro Se*

Certificate

I certify that the foregoing petition for rehearing is presented in good faith and not for delay.

OLIVER W. TOLL

[Same caption, *Toll* v. *Gwynne*, Court of Appeals]

Order

Upon consideration of appellant's petition for rehearing with respect to the discussion contained in the last two paragraphs of the opinion entered herein on July 3, 1957, it is

ORDERED by the Court that the aforesaid petition be, and it is hereby, denied.

Dated: September 3 1957 *Per Curiam.*

[Filed September 3, 1957]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13544

THOMAS G. HOFFMAN, *Appellant*

v.

WILBUR M. BRUCKER, Secretary of the Army, ET AL., *Appellees*

Appeal from the United States District Court for the District of Columbia

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Decided May 23, 1957

Mr. Claude L. Dawson for appellant.

Mr. Peter H. Schiff, Attorney, Department of Justice, for appellees. Assistant Attorney General *George Cochran Doub, and Messrs. Oliver Gasch*, United States Attorney, *Paul A. Sweeney* and *Morton Hollander*, Attorneys, Department of Justice, were on the brief for appellees. *Mr. Lewis Carroll*, Assistant United States Attorney, also entered an appearance for appellees.

Before EDGERTON, *Chief Judge*, and PRETTYMAN and FAHY, *Circuit Judges*.

PER CURIAM: Appellant, a veterans' preference eligible, held an indefinite civil service appointment in the Springfield Ordinance District. His position was abolished, thus causing his reduction in force. He contends that within the meaning of section 12 of the Veterans' Preference Act of 1944, 58 Stat. 390, as amended, 5 U.S.C. § 861 (1952),[1]

[1] Section 12 provides in pertinent part: "In any reduction of personnel • • • competing employees shall be released in accordance with Civil Service Commission regulations which shall give due effect to • • • military preference • • •."

he was a "competing employee" with non-veterans holding positions in lower grades and that he should have been retained in their stead. The regulations of the Civil Service Commission, however, do not give to a veterans' preference eligible holding an indefinite appointment a right to be retained in a lower grade in preference to those in that grade who are not veteran preference eligibles.[2] We cannot say that this effect of the regulations is so inconsistent with the Veterans' Preference Act as to require the Court to reach a conclusion different from that of the officials charged with primary responsibility in administering the Act. Accordingly, the judgment of the District Court in favor of appellees, granted on their motion for summary judgment, is

Affirmed.

UNITED STATES CONSTITUTION

Fifth Amendment

* * * nor shall any person * * * be deprived of life, liberty, or property, without due process of law * * *.

STATUTES

Civil Service Act, Act of January 16, 1883, c. 27, 22 Stat. 403 (5 U.S.C.A. 632, et seq.):

SEC. 2. * * *

Second. And, among other things, said rules shall provide and declare, as nearly as the conditions of good administration will warrant, as follows:

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[2] Employees in different grades may be in the same "competitive level" if they can be readily interchanged without undue interruption to the work program. §20.2(f) of the Commission's Regulations. Appellant does not urge that the jobs are so interchangeable.

First, for open, competitive examinations for testing the fitness of applicants for the public service now classified or to be classified hereunder. * * *

Second, that all the offices, places and employments so arranged or to be arranged in classes shall be filled by selections according to grade from among those graded highest as the results of such competitive examinations.

* * * * * * * * * * *

Fifth, no person in the public service is for that reason under any obligations to contribute to any political fund, or to render any political service, and that he will not be removed or otherwise prejudiced for refusing to do so.

* * * * * * * * * * *

Sixth, no person in said service has any right to use his official authority or influence to coerce the political action of any person or body.

* * * * * * * * * * *

Eighth. * * * And any necessary exceptions from said eight fundamental provisions of the rules shall be set forth in connection with such rules, and the reasons therefor shall be stated in the annual reports of the Commission. * * * [5 U.S.C.A., Sec. 633(2)]

* * * * * * * * * * *

SEC. 7. That after the expiration of six months from the passage of this act no officer or clerk shall be appointed, and no person shall be employed to enter or be promoted in either of the said classes now existing, or that may be arranged hereunder pursuant to said rules, until he has passed an examination, or is shown to be specially exempted from such examination in conformity herewith. But nothing herein contained shall be construed to take from those honorably discharged from the military or naval service any preference conferred by the seventeen hun-

dred and fifty-fourth section of the Revised Statutes, nor to take from the President any authority not inconsistent with this act conferred by the seventeen hundred and fifty-third section of said statutes * * *. [5 U.S.C.A., Sec. 638]

Veterans' Preference Act of 1944, Act of June 27, 1944, 58 Stat. 385; 5 U.S.C.A. (Cum. Supp.) Sec. 851, et seq.:

* * * That this act may be cited as the "Veterans' Preference Act of 1944."

SEC. 2. In certification for appointment, in appointment, in reinstatement, in reemployment, and in retention in civilian positions in all establishments, agencies, bureaus, administrations, projects, and departments of the Government, permanent or temporary, and in either (a) the classified civil service; (b) the unclassified civil service; * * * preference shall be given to * * * (4) those ex-servicemen and women who have served on active duty in any branch of the armed forces of the United States, during any war, or in any campaign or expedition (for which a campaign badge has been authorized), and have been separated therefrom under honorable conditions * * * [5 U.S.C.A. (Cum. Supp.) Sec. 851]

* * * * * * * * * * *

SEC. 8. When, in accordance with civil-service laws and rules, a nominating or appointing officer shall request certification of eligibles for appointment purposes, the Civil Service Commission shall certify, from the top of the appropriate register of eligibles, a number of names sufficient to permit the nominating or appointing officer to consider at least three names in connection with each vacancy. The nominating or appointing officer shall make selection for each vacancy from not more than the highest three names available for appointment on such certification * * * [5 U.S.C.A. (Cum. Supp.) Sec. 857]

SEC. 9. In the unclassified Federal, and District of Columbia, civil service, and in all other positions and em-

ployment hereinbefore referred to in (c) of section 2 hereof, the nominating or appointing officer or employing official shall make selection from the qualified applicants in accordance with the provisions of this act. [5 U.S.C.A. (Cum. Supp) Sec. 858]

* * * * * * * * * *

SEC. 11. The Civil Service Commission is hereby authorized to promulgate appropriate rules and regulations for the administration and enforcement of the provisions of this act. [5 U.S.C.A. (Cum. Supp.) Sec. 860]

SEC. 12. In any reduction in personnel in any civilian service of any Federal agency, competing employees shall be released in accordance with Civil Service Commission regulations which shall give due effect to tenure of employment, military preference, length of service, and efficiency ratings: *Provided*, That the length of time spent in active service in the armed forces of the United States of each such employee shall be credited in computing length of total service: *Provided further*, That preference employees whose efficiency ratings are "good" or better shall be retained in preference to all other competing employees and that preference employees whose efficiency ratings are below "good" shall be retained in preference to competing nonpreference employees who have equal or lower efficiency ratings: *And provided further*, That when any or all of the functions of any agency are transferred to, or when any agency is replaced by, some other agency, or agencies, all preference employees in the function or functions transferred or in the agency which is replaced by some other agency shall first be transferred to the replacing agency, or agencies, for employment in positions for which they are qualified, before such agency, or agencies, shall appoint additional employees from any other source for such positions.

* * * * * * * * * *

SEC. 14. No permanent or indefinite preference eligible, who has completed a probationary or trial period employed

in the civil service, or in any establishment, agency, bureau, administration, project, or department, hereinbefore referred to shall be discharged, suspended for more than thirty days, furloughed without pay, reduced in rank or compensation, or debarred for future appointment except for such cause as will promote the efficiency of the service and for reasons given in writing, and the person whose discharge, suspension for more than thirty days, furlough without pay, or reduction in rank or compensation is sought shall have at least thirty days' advance written notice (except where there is reasonable cause to believe the employee to be guilty of a crime for which a sentence of imprisonment can be imposed), stating any and all reasons, specifically and in detail for any such proposed action; such preference eligible shall be allowed a reasonable time for answering the same personally and in writing, and for furnishing affidavits in support of such answer, and shall have the right to appeal to the Civil Service Commission from an adverse decision of the administrative officer so acting, such appeal to be made in writing within a reasonable length of time after the date of receipt of notice of such adverse decision: *Provided*, That such preference eligible shall have the right to make a personal appearance, or an appearance through a designated representative, in accordance with such reasonable rules and regulations as may be issued by the Civil Service Commission; after investigation and consideration of the evidence submitted, the Civil Service Commission shall submit its findings and recommendations to the proper administrative officer and shall send copies of same to the appellant or to his designated representative, and it shall be mandatory for such administrative officer to take such corrective action as the Commission finally recommends * * *.

* * * * * * * * * *

SEC. 18. All acts and parts of acts inconsistent with the provisions hereof are hereby modified to conform herewith, and this act shall not be construed to take away from

any preference eligible any rights heretofore granted to, or possessed by, him under any existing law, Executive order, civil-service rule or regulation, of any department of the Government or officer thereof. [5 U.S.C.A. (Cum. Supp.) Sec. 867]

* * * * * * * * * * *

SEC. 21. If any part of this act shall be found to be unconstitutional, the rest of it shall be considered as in full force and effect.

FEDERAL RULES OF CIVIL PROCEDURE

Rule 44. Proof of Official Record

(a) AUTHENTICATION OF COPY. An official record or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof or by a copy attested by the officer having the legal custody of the record, or by his deputy, and accompanied with a certificate that such officer has the custody. * * *

* * * * * * * * * * *

Rule 56. Summary Judgment

* * * * * * * * * * *

(c) MOTION AND PROCEEDINGS THEREON. * * * The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. * * *

* * * * * * * * * * *

(e) FORM OF AFFIDAVITS; FURTHER TESTIMONY. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible

in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. * * *

(f) When Affidavits Are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

COURT RULES

Rules of the United States District Court for the District of Columbia

Rule 29. Veterans' Cases, Etc.

* * * * * * * * * * *

(c) Duties of Commissioner. He shall endeavor, by conference with the attorneys, to simplify the issues, settle the pleadings by any proper amendments, obtain admission of facts and documents, regulate the time for taking depositions, limit the number of expert witnesses, and otherwise promote a final disposition of the case.

(d) Report of Commissioners. He shall report to the court the results of the reference, specifying any issues of fact to be tried, or if an issue of law is raised, giving his opinion and the authorities bearing thereon.

CODE OF FEDERAL REGULATIONS

Title 5—Part 20—Retention Preference Regulations for Use in Reduction in Force

[As revised December 25, 1952, and as amended to October, 1953]

SEC. 20.1 EXTENT OF PART. The regulations in this part establish degrees of retention preference and uniform rules for reductions in force. They apply to all civilian employees in the executive branch of the Federal Government, and in the municipal government of the District of Columbia, except those whose appointments are required to be approved by the Senate, and those who are appointed by the President of the United States. (Sec. 20, 58 Stat. 391; 5 U.S.C. 869.)

SEC. 20.2 DEFINITIONS. For the purposes of the regulations in this part definitions are given for words, terms, and phrases as follows:

(a) "Reduction in force" means the involuntary separation of an employee from a duty and pay status for more than 30 days, by furlough or by separation from the rolls, in order to reduce personnel. The term does not apply to termination of temporary appointments, retirement of employees, or separations for cause and other actions proposed for reasons which promote the efficiency of the service.

(b) "Furlough" * * *

(c) "Competing employees" for any position in a reduction in force means the position incumbent, if any, and employees who are qualified for the position.

(d) "Qualified" for a position means having the basic education and experience, and such special skills and aptitudes as are necessary, to take over the position in a reduction in force and render satisfactory service without undue interruption to the work program.

(e) "Competitive area" means that part of an agency, usually within a local commuting area, in which employees are shifted, transferred, reassigned, promoted, and demoted under single administrative authority, and within which competitive levels are established in reductions in force. (It does not establish a limitation for placement during reduction in force.)

(f) "Competitive level" means all similar positions within a competitive area in which employees could be readily interchanged, without undue interruption to the work program. (Generally such positions will be in the same grade or occupational level, but this is not necessary if the other tests are met.)

(g) "Retention standing" means precise rank among competing employees for a continuing position, by retention group and subgroup, and by retention credits within each subgroup.

(h) "Retention credits" are credits given for length of Government service and performance ratings.

(i) "Government service" means the total of all periods of civilian service in the executive, legislative, and judicial branches of the Federal Government and in the District of Columbia Government, and of all active military service.

(j) "Performance rating" • • •

(k) "Continuing position" in a reduction in force is a position which is expected to continue for at least 3 months after the effective date of the separation, furlough, or reduction in grade or salary of an employee qualified for such position.

(l) "Effective date" • • •

Sec. 20.3 Completion of Employee Records. • • •

Sec. 20.4 Order of Selection—(a) Determination of Competitive Area. (1) An agency may establish a gen-

eral plan of competitive areas by obtaining prior approval from the central office of the Civil Service Commission. Subsequent clearance with the Commission will not be required concerning competitive areas conforming to the approved general plan unless there has been a material change in the agency's organizational structure or other facts on which the general plan was approved.

(2) In the absence of an approved general plan the normal competitive area shall be a bureau or equivalent part of an agency in the departmental service, or all of a field installation in a local commuting area, or any combination of these as may be determined by the agency.

(b) DETERMINATION OF COMPETITIVE LEVEL. Within the competitive area the agency will determine competitive levels of positions to be affected by a reduction in force.

(c) DETERMINATION OF TENURE GROUPS. For the purpose of determining relative retention preference in reductions in force, competing employees with performance ratings of "Satisfactory" or better shall be classified according to tenure of employment and veteran preference in groups and subgroups as follows:

(1) GROUP I—CAREER. In the competitive service, this group consists of career employees who have completed probation and who are not "temporary" or "indefinite" as the result of promotion, transfer, or reinstatement, except that career employees serving under conditional promotions shall be considered in this group with respect to positions at and below the grade in which they last served on a permanent basis. In positions excepted from the competitive service, this group includes all employees serving under appointments with no conditions or restrictions. Within this group, persons entitled to veteran preference are in subgroup "A" and others in subgroup "B."

(2) GROUP II—CAREER-CONDITIONAL. In the competitive service, this group includes career employees who are con-

ditional because they are serving probationary periods, or are "temporary" or "indefinite" as the result of promotion, transfer, or reinstatement, or are subject to some other limitation of a similar nature. In positions excepted from the competitive service, it includes employees who are conditional solely as the result of promotion or reinstatement. Within this group, persons entitled to veteran preference are in subgroup "A" and others in subgroup "B."

(3) GROUP III—INDEFINITE. This group includes persons serving under nonstatus non-temporary appointments in positions in the competitive service. It also includes employees in positions excepted from the competitive service serving under any condition or limitation other than a conditional promotion or reinstatement or a specific time limitation of 1 year or less. Within this group, persons entitled to veteran preference are in subgroup "A" and others in subgroup "B."

(d) RETENTION REGISTER. (1) COMPILATION. When two or more competing employees are in a competitive level which is to be affected by a reduction in force, the retention records of such employees shall be brought up to date on a current basis, and a retention register shall be compiled. All employees in positions in the particular competitive level, whether in duty, leave, or furlough status, excluding only those absent in the armed forces of the United States with reemployment rights, shall be entered on the register in the order of retention groups and subgroups, and according to retention credits in any subgroup when there are two or more. One retention credit shall be given for each full year of Federal Government service, and four retention credits shall be given for an "Outstanding" performance rating. If there are any temporary employees assigned to positions in the competitive level, their names and the expiration dates of their appointments shall be entered below the space provided for employees in retention groups on the register. Like-

wise, if there are any employees serving in positions in the competitive level under any kind of appointments, with current official performance ratings of "Unsatisfactory," their names shall be entered on the register below the names of temporary appointees.

(2) SEPARATION OF REGISTERS. Separate registers shall be compiled to show the distinctions between competitive levels representing positions in the competitive service; excepted from the competitive service; and those filled on a seasonal, when-actually-employed (WAE), or part-time basis.

(3) AVAILABILITY FOR INSPECTION. Employees notified of proposed adverse action in a reduction in force shall have an opportunity to examine retention registers and other records which have a bearing on the actions in their cases. All registers and records shall be open for inspection by representatives of the Civil Service Commission.

(c) SEQUENCE OF SELECTION. With respect to each competitive level, action must be taken to remove all employees with official "Unsatisfactory" performance ratings, and all temporary employees, from positions affected by a reduction in force before any competing employee, in any retention group, is reached for action. Thereafter, selections for action must be made in order from the bottom to the top of the register. Half years of service will be used in breaking ties in retention standing, but any ties still remaining will be decided administratively.

SEC. 20.5 ACTIONS—(a) IN GENERAL. Employees who cannot be retained in their positions because of a reduction in force will be changed to continuing positions, separated, or furloughed.

(b) EMPLOYEES IN POSITIONS IN THE COMPETITIVE SERVICE. (1) No employee may be separated, or furloughed for more than 30 days, or reduced in pay or grade in a reduction

in force while a competing employee with lower retention standing is retained in the same competitive level.

(2) No employee in any subgroup of the career group or the career-conditional group who is willing to accept a reasonable change in position may be separated, furloughed for more than 30 days, or subjected to greater reduction in pay than necessary under such reasonable change in position, if he is qualified for a continuing position in another competitive level in his present competitive area in which an employee with lower subgroup standing is retained or if he is qualified to go back to a continuing position from which he was promoted (or to an essentially identical position) in his present competitive area in which an employee with lower retention standing is retained.

(c) EMPLOYEES IN POSITIONS EXCEPTED FROM THE COMPETITIVE SERVICE. No employee in a position excepted from the competitive service may be separated, furloughed for more than 30 days, or reduced in grade or pay in a reduction in force if a competing employee with lower retention standing is retained in the same competitive level.

(d) REASONABLE CHANGE IN POSITION. Any change in position under these regulations is reasonable if it is made without reduction in grade or pay. If a reduction in grade or pay cannot be avoided, any such change is reasonable if made with the least reduction required to conform with these regulations. Employees are not required to be given options as to alternative changes possible in any particular case. No agency shall be required to fill a vacant position, or to promote any employee, or to tranfer any employee to a different duty station, and no agency shall be prohibited from taking such administrative actions. No employee rendering satisfactory service in a position shall be required to be displaced by a competing employee who is not qualified for such position under the regulations in this part).

(e) FURLOUGHS. * * *

(f) EXCEPTIONS. * * *

Sec. 20.6 NOTICE TO EMPLOYEES—(a) PROPOSED ACTION. Each employee who is to be separated from the rolls, furloughed for more than 30 days, or reduced in grade or pay, in a reduction in force, under the regulations in this part, shall be given a notice in writing, stating specifically the action proposed in his case and the reasons therefor, at least 30 days, and not more than 90 days, except as provided in paragraph (e) of this section, in advance of the effective date of the action.

(b) STATUS DURING NOTICE PERIOD. * * *

(c) GENERAL AND SPECIAL NOTICES. * * *

(d) CONTENTS OF NOTICE. * * *

(e) EMPLOYEE WITH STATUTORY RETENTION RIGHTS. * * *

(f) INVALIDATION OF NOTICES. * * *

Sec. 20.7 REEMPLOYMENT PRIORITY. * * *

Sec. 20.8 SPECIAL REGULATIONS RELATING TO CONSOLIDATION AND LIQUIDATIONS. * * *

Sec. 20.9 APPEALS. (a) Any employee notified of proposed action in a reduction in force who believes that the regulations in this part have not been correctly applied may appeal to the appropriate office of the Civil Service Commission, stating reasons for believing the proposed action to be improper, within 10 days from the date he received notice of the proposed action (or supplementary notice specifying different adverse action), or within 10 days after a decision by the agency on his answer to any notice giving him an opportunity to answer.

(b) Further appeals: An appeal may be made by the employee or the employing agency from the initial decision within the Commission, to the Commissioners, United States Civil Service Commission, Washington 25, D. C.,

within 7 days of the date of receipt of notification of the initial decision.

(c) Finality of Commission recommendation: * * * Commission's recommendation, but action to comply with an initial decision may be stayed when a further appeal to the Commissioners is made in accordance with paragraph (b) of this section, until such time as the Commission's decision on the further appeal is made. (62 Stat. 575; 5 U.S.C. Supp. II 868.)

CIVIL SERVICE RULES

[As printed in Federal Personnel Manual, pp. Z1-211, *et seq.* Cf. corresponding section numbers in 5 CFR (pocket supp.)]

Rule I—Coverage and Definitions

* * * * * * * * * *

SEC. 01.3 DEFINITIONS. As used in these Rules:

(a) "Competitive service" shall have the same meaning as the words "classified service", or "classified (competitive) service", or "classified civil service" as defined in existing statutes and executive orders.

* * * * * * * * * *

SEC. 01.4 EXTENT OF EXCEPTED SERVICE.

(a) The excepted service shall include all civilian positions in the executive branch of the Government which are specifically excepted from the requirements of the Civil Service Act or from the competitive service by or pursuant to statute or by the Commission under section 06.1 of Rule VI.

(b) "Excepted service" shall have the same meaning as the words "unclassified service", or "unclassified civil service", or "positions outside the competitive civil service" as used in existing statutes and executive orders.

Rule VI—Exceptions From the Competitive Service

Sec. 06.1 Authority to except positions from the competitive service. (a) The Commission is authorized to except positions from the competitive service whenever it determines that appointments thereto through competitive examination are not practicable. Upon the recommendation of the agency concerned, it may also except positions which are of a confidential or policy-determining character. Such exceptions from the competitive service shall be effective upon publication thereof in the Federal Register. Positions excepted by the Commission shall be listed in Schedule A, B, or C, as provided for in section 06.2 of this Rule, and shall also be listed in the Commission's annual report for the fiscal year in which the exceptions are made.

* * * * * * * * * * *

Sec. 06.2 Schedules of Excepted Positions. The Commission shall list positions that it excepts from the competitive service in Schedules A, B, and C, which schedules shall constitute parts of this Rule, as follows:

Schedule A. Positions other than those of a confidential or policy-determining character for which it is not practicable to examine shall be listed in Schedule A.

CIVIL SERVICE REGULATIONS

Part I—Coverage and Definitions

* * * * * * * * * * *

Sec. 1.102 Definitions. As used in Parts 1 through 11 of the regulations in this chapter, the term:

* * * * * * * * * * *

(f) "Competitive service" means "classified service," "classified (competitive) service," or "classified civil service" as defined in existing statutes and Executive orders. The competitive service shall include:

(i) All civilian positions in the executive branch of the Government, unless specifically excepted from the

civil service laws by or pursuant to statute, or by the Commission under section 06.1 of Rule VI; * * *

* * * * * * * * * * *

(i) "Eligible" means any applicant who meets the minimum entrance requirements and is rated 70 or more in an examination by the Commission.

(j) "Excepted position" means a position in the excepted service.

(k) "Excepted service" means "unclassified service", "unclassified civil service", or "positions outside the competitive civil service" as used in existing statutes and Executive orders. The excepted service shall include all civilian positions in the executive branch of the Government which are specifically excepted from the requirements of the Civil Service Act or from the competitive service by or pursuant to statute or by the Commission under section 06.1 of Rule VI.

* * * * * * * * * * *

Part 6—Exceptions From the Competitive Service

Schedule A

Sec. 6.100 * * * The positions enumerated in sections 6.101 to 6.199 are positions other than those of a confidential or policy-determining character for which it is not practicable to examine and which are excepted from the competitive service and constitute Schedule A.

Sec. 6.101 Entire Executive Civil Service.

* * * * * * * * * * *

(d) Attorneys.

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UNITED STATES CIVIL SERVICE COMMISSION

FEDERAL PERSONNEL MANUAL

Chapter R3—Reduction in Force

[as of October, 1953]

* * * * *

Advance Preparation

DETERMINING AMOUNT AND LOCATION OF CUTS

The agency, not the Civil Service Commission, decides when cuts in personnel shall be made, what competitive areas and levels shall be cut, and how large a cut shall be made in a particular competitive area and level. [R3-3]

DETERMINING METHOD OF MAKING CUTS

* * * Subject to compliance by the agency with procedural requirements, employees may be transferred or reassigned to other positions, separated for cause, or reduced in rank or compensation for such reasons as will promote the efficiency of the service without regard to the retention preference regulations. Such agency authority is constant and is not suspended during reduction in force. * * *

Where, in a period of reduction in force, only employees at lower levels are proposed to be separated and employees at higher levels are to be reduced in rank or compensation an agency may choose to use reduction-in-force procedures to effect such reductions in rank or compensation and determine retention order under those procedures, or, subject to procedural requirements, may exercise administrative discretion in selecting those employees whose reduction in rank or compensation would promote the efficiency of the service.

Employees may be reduced in rank or compensation and changed from a higher grade to a lower grade in a reduction in force even though employees in the lower grade in the same or a lower retention subgroup have been separated or furloughed therefrom. * * * [R3-3]

* * * * *

Retention Preference

* * * * *

PERFORMANCE RATING

* * * * *

* * * Only the current official rating of record may be used for reduction-in-force purposes. [R3-9]

* * * * *

Retention Order

* * * * *

* * * Although examinations are usually adapted to specific types of positions, the fact that two positions are filled from competitors in the same examination does not necessarily mean that the positions are in the same competitive level in a reduction in force. [R3-11]

* * * * *

Positions are not in the same competitive level unless interchange of personnel is feasible in both directions. For example, the position of clerk-stenographer, GS-2, and clerk-typist, GS-2, are not in the same competitive level because they are not interchangeable, even though a particular clerk-typist may be qualified for a clerk-stenographer job. [R3-11]

* * * * *

Separation, Furlough, Restoration, Appointment, or Reassignment[1] of Employees

[Note] 1. The word "reassignment", as used in this chapter, * * * is used to mean any position change; that is, the shifting of an employee from one position to another within the agency whether the movement is upward (promotion), downward (demontion), or lateral (reassignment without promotion or demontion). [R3-13]

* * * * *

REASSIGNMENT RIGHTS

QUALIFICATIONS FOR REASSIGNMENT.—The reassignment rights under Part 20 must be construed to require the reassignment of an employee to another position if the employee is fully qualified to perform the duties of the posi-

tion. * * * An employee shall have the right to be placed in another position in lieu of separation unless there are facts from which it would be reasonable to conclude that his placement in the position would cause undue interruption in the work program of the agency. [R3-13-14]

As a general rule the qualifications standards and requirements for noncompetitive actions (Chapter A6) need not be observed, and Standard Form 59 need not be submitted, where an employee is otherwise entitled to reassignment under the retention preference regulations and the agency is satisfied that he is fully qualified and can perform satisfactorily the duties of the position. However, the qualifications standards and requirements, plus all requirements for the specific position, will be applied:

(a) If the employee's qualifications are in issue in an appeal and the Commission makes a determination of qualifications. [R3-14]

* * * * *

Appeals

* * * * *

Matters Which May Be Appealed

A reduction-in-force appeal may be based on such things as:

* * * * *

(2) Excessive narrowness of competitive area or competitive level. [R3-19]

* * * * *

COMMISSION ACTION ON APPEALS

* * * * *

* * * In such hearings, employees are given an opportunity to present evidence and to examine and reply to evidence from the agency. [R3-20]

* * * * *

LETTERS

UNITED STATES CIVIL SERVICE COMMISSION

Washington 25, D. C.

DAE:LWV:jm April 9, 1954

Mr. Oliver W. Toll
2 Newlands Street
Chevy Chase 15, Maryland

Dear Mr. Toll:

Further reference is made to the appeal submitted by you against the reduction in force action of the Federal Trade Commission in separating you from your position of Attorney-Advisor, GS-11.

A review of your case has failed to disclose any irregularities under the Retention Preference Regulations covering reduction in force actions.

Investigation disclosed that the competitive area and the competitive level were in accord with the regulations; that the retention register was properly set up; that your name was reached in order; and that you received a valid notice.

Careful consideration has been given to all of the questions raised by you and your representatives in your appeal and at your hearing that have a bearing on the reduction in force action and over which the Civil Service Commission has jurisdiction.

Investigation disclosed that you had personal competitive status acquired during previous Federal employment under the provisions of the Ramspeck Act and Executive Order 8743. The records further disclosed that at the time you received the reduction in force notice, you were serving under a Schedule A excepted appointment under Regulation 6.101(d) without competitive status in position and with indefinite tenure.

The competitive area used in the action was the departmental service in Washington, D. C., which is in accord

with the regulations and was not restricted to a bureau, branch, or division.

The competitive level was found to include all tfiose Attorney-Advisor positions in the excepted service in grade GS-11, the official duties of which were sufficiently alike as to permit the free interchange of incumbents placing such employees in direct competition with each other. This, too, was found to be in compliance with the Retention Preference Regulations. Such a grouping of employees is necessary in order to determine the relative retention rights of employees for remaining on or for being separated from their official positions and duties for which they are paid. Temporary details from their positions; temporary assignments to other duties, and abilities to perform other duties are not factors that can be considered in determining these relative retention rights.

The retention register was found after careful checking to include the names of all the incumbents of positions of the same grade—GS-11; in the same service—excepted; in the same position classification series—Attorney-Advisor; in the departmental service in Washington; and whose official duties as set forth on classification sheets of record were sufficiently alike as to making incumbents interchangeable. The register included the names of four employees, three in addition to your own. The retention classification and order of standing on the register was found to be correct—the other three placed in Subgroup I-A and your own in Subgroup III-A, thereby placing your name on the bottom of the register. Your name was, therefore, properly reachable upon determination of the agency that it would effect a separation of one or more employees from your competitive level by reduction in force procedures.

It was finally found that the reduction in force notice issued you was a valid notice under the Retention Preference Regulations.

The Civil Service Commission is, therefore, unable to sustain your appeal.

No further appeal to this decision will be entertained unless it is submitted to the Commissioners, U.S. Civil Service Commission, Washington 25, D. C., within seven (7) days of receipt of this decision. Additional representations should be made in writing and submitted in duplicate with the appeal to the Commissioners.

Sincerely yours,

E. A. Dunton
Chief, Appeals Examining Office

UNITED STATES CIVIL SERVICE COMMISSION

Washington 25, D. C.

BAR:GT:jg

September 30, 1954

Mr. Oliver W. Toll
2 Newlands Street
Chevy Chase 15, Maryland

Dear Mr. Toll:

Reference is made to your appeal from the decision of the Appeals Examining Office that there were no irregularities in your separation, because of reduction in force, from the position of Attorney-Advisor, GS-11 Federal Trade Commission. A review of the file in your case reveals that you question the necessity for the reduction in force; that many attorneys with lesser retention rights under the Veterans Preference Act were retained in the reduction-in-force proceedings instead of you; that you have competitive status and should have been so considered in the reduction-force-action; that you had been advised by the Director of Personnel that the entire Washington area was the competitive area for the reduction in force; that the competitive levels were too narrow as they should have included attorneys in other divisions, including trial attorneys; that the preparation of separate

retention registers for attorneys with competitive status and those with excepted status was illegal in view of the provisions of Executive Order No. 10463; and that you were denied access to information which you believe should have been made available to you.

Inherent in management authority is the right to determine the number and types of personnel required to carry on the functions of the agency. Such determination is not subject to review by the Civil Service Commission. The Commission's Retention Preference Regulations do not contain authority to review the agency's decision to abolish any particular position, they establish degrees of retention preference and uniform rules for reductions in force.

The Commission's authority to promulgate the Retention Preference Regulations is contained in Section 12 of the Veterans Preference Act of 1944, which states that in any reduction in personnel "in any civilian service of any Federal agency, competing employees shall be released in accordance with Civil Service Commission regulations which shall give due effect to tenure of employment, military preference, length of service, and efficiency ratings." You will note that "tenure of employment" is given priority over "military preference" in the list of factors to be considered in the retention of employees.

Altho you had acquired a competitive status in 1942 while employed in the Bureau of Internal Revenue, your indefinite appointment to the Federal Trade Commission on June 11, 1951, was after a break in service and was made under the authority of Schedule A, and you were, therefore, correctly placed in retention subgroup III-A.

The matter of the competitive area was discussed at the hearing and you were advised at that time that the headquarters office in Washington, D. C. was the competitive area, a separate competitive area being established for the Washington, D. C., field office. This is in accordance with the Retention Preference Regulations.

In making determinations as to which positions should be included in a competitive level, the duties of the position are controlling, rather than the qualifications of individual incumbents. In other words, positions are not in the same competitive level unless interchange of personnel is feasible in both directions. For this reason trial attorneys and attorney-advisors have been uniformly recognized as being in separate competitive levels in reductions in force. The fact that certain employees have served in a number of different divisions would not be evidence that the positions in those divisions are interchangeable. At any rate, the agency has certified that you were the only GS-11 attorney in the Headquarters office of the Federal Trade Commission in retention group III, and the competitive levels therefore had no bearing on your separation since you would have been the first employee separated had all GS-11 attorneys in the headquarters office been included on one retention register.

According to the records of the Commission, you were offered an opportunity to review the retention register jointly with the Commission's investigator, but you declined the offer. It also appears that much of the information you sought is not required to be made available to employees affected by a reduction-in-force action.

In view of all the facts in your case, there is no basis for sustaining your appeal. The previous decision in your case is therefore affirmed.

For the Commissioners:

Sincerely yours,

John E. Blann
Chairman, Board of Appeals and Review

UNITED STATES CIVIL SERVICE COMMISSION

Washington 25, D. C.

BAR:ST:rec November 2, 1954

Mr. Oliver W. Toll
2 Newlands Street
Chevy Chase 15, Maryland

Dear Mr. Toll:

Reference is made to your letter of October 5, appealing from the decision of this Board that there was no violation of your rights in your separation, because of reduction in force, from the position of Attorney-Adviser, GS-11, Federal Trade Commission.

In your appeal, you contend that you should have been accorded reassignment rights with respect to positions held by employees having lower retention rights than you, including the positions occupied by Kenneth L. Sloan and Lynn M. Hubler. In this connection your attention is invited to Civil Service Regulations, Section 20.5(b), which states that "No employee in a position excepted from the competitive service may be separated, furloughed for more than 30 days, or reduced in grade or pay in a reduction in force if a *competing* employee with lower retention standing is retained in the same competitive level." [Emphasis supplied]. Messrs. Sloan and Hubler were not competing employees under the terms of the Retention Preference Regulations inasmuch as they were serving as Attorney-Adviser, GS-9.

You will note that no provision is made for reassignments of employees serving in excepted positions who are affected by a reduction in force. However, even had you been eligible for reassignment under the Retention Preference Regulations, you could not have displaced either Mr. Sloan or Mr. Hubler since they both were in retention subgroup III-A, which is the retention subgroup in which your name appeared in your competitive level. The Regulations do not permit reassignments to positions occupied

by employees in the same subgroup as that occupied by the employee being reassigned.

The fact that you were the only GS-11 attorney in the Headquarters office of the Federal Trade Commission in retention group III was verified by the Commission's investigator prior to the decision on your appeal by the Appeals Examining Office.

Prior to the decision on your original appeal, a careful investigation was made by the Commission at the Federal Trade Commission regarding the competitive levels set up and the retention registers for those competitive levels. Since employees serving in excepted positions have no mandatory rights to reassignment, the sole issue before the Commission was whether or not you had been properly reached for separation.

Since the Commission's investigation revealed that you were the only GS-11 attorney in the headquarters office of the Federal Trade Commission in retention group III and inasmuch as you were correctly placed in that retention group, under the Regulations you would be the first employee to be affected by a reduction in force of GS-11 Attorneys in the competitive area.

There is, therefore, no basis upon which your appeal may be sustained and the previous decision is therefore affirmed.

For the Commissioners:

Sincerely yours,

John E. Blann
Chairman, Board of Appeals and Review

UNITED STATES CIVIL SERVICE COMMISSION

Washington 25, D. C.

November 17, 1954
[mailed 11/18/54]

Mr. Oliver W. Toll
2 Newlands Street
Chevy Chase 15, Maryland

Dear Mr. Toll:

Reference is made to your letter of November 8, 1954, appealing to the Commissioners from a decision of this Board on the matter of your separation, because of reduction in force, from the position of Attorney-Advisor, GS-11, Federal Trade Commission.

Your appeal of April 16, 1954, to the Commissioners had been referred, in accordance with the regulations, to the Board of Appeals and Review, for action, and it was the final appeal provided by such regulations. Consequently, the decision as reflected in the letter of September 30, 1954, from the Chairman of the Board, affirming the reduction-in-force action effected in your case by the Federal Trade Commission, represents a final decision within the Commission. The letter dated November 2, 1954, was in reply to specific questions you raised regarding the decision of September 30, 1954.

Sincerely yours,

John E. Blann
Chairman, Board of Appeals and Review